

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)	
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Digital Broadcast Copy Protection)	MB Docket No. 02-230
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COMMENTS ON THE PROMULGATION OF A BROADCAST FLAG RULE¹

EXECUTIVE SUMMARY

Any broadcast flag rule adopted by the Commission could effectively limit the public's access to information, and impair its ability to use content in new and innovative ways. Libraries serve the needs of millions of members of the public every year with information resources ranging from traditional books and print media, audio and videotape collections, electronic resources, and the Internet. Libraries are a primary source of information for under-served populations such as remote rural communities, recent immigrants, the poor, and the homeless. The public uses information obtained through libraries for teaching, study and scholarship purposes, and to create new works that benefit our society as a whole. Libraries function today because of important general exceptions and library specific exceptions in the copyright law that control the use of content. It is imperative that such limiting principles be maintained in any regulation of the digital information environment.

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The digital revolution has allowed libraries to provide services to more members of the public than ever before, and to create innovative programs using technology to educate the public. The benefit of such technologies should not be restricted by a premature rule that limits new and innovative uses. As digital capabilities expand, rights holders have proposed and in some cases have imposed restrictive technological protection measures on content, limiting the ability of libraries to serve the public's needs. A broadcast flag rule could accelerate this trend by imposing a government mandate, requiring the use of a particular content protection technology, and likely setting a dangerous precedent for the future regulation of content use.

I. INTRODUCTION

These comments are filed in response to the FCC Notice of Proposed Rulemaking regarding Digital Broadcast Copy Protection (MB Docket No. 02-230) (hereinafter NPRM) on behalf of five major library associations: the American Library Association,² the American Association of Law Libraries,³ the Association of Research Libraries,⁴ the Medical Library Association,⁵ and the Special Libraries Association⁶ (hereinafter

² The American Library Association is a non-profit, educational organization of approximately 61,000 librarians, library educators, information specialists, library trustees, and friends of libraries representing public, school, academic, state, and specialized libraries.

³ The American Association of Law Libraries is a non-profit, educational organization of over 5,000 members. Its members respond to the legal information needs of legislators, judges, and other public officials at all levels of government, corporations and small businesses, law professors, students, attorneys and the general public.

⁴ The Association of Research Libraries is a non-profit association of 124 research libraries in North America including university, public, government, and national libraries whose mission is to advance the future of research libraries in the process of scholarly communication.

⁵ The Medical Library Association is an educational organization of more than 1,000 institutions and 3,800 individual members in the health sciences information field.

⁶ The Special Libraries Association is an international association representing the interests of thousands of information professionals in over seventy countries, including the United States. Its members collect,

Libraries). These associations represent the interests of tens of thousands of libraries,⁷ the patrons who benefit from their services,⁸ and the librarians who serve them.

A. Libraries Provide Services For The General Public Which Extend Beyond Traditional Print Resources

Library patrons today are no longer limited to the printed word as their sole resource for information. Increasingly, patrons access content from diverse media sources.⁹ In addition to the common practice of borrowing books, today's patrons regularly use their libraries to access video resources, electronic publications,¹⁰ electronic archives, and the Internet.¹¹

Many public, school and academic libraries today also consider themselves media centers housing (in addition to printed content) computers, personal video recorders, DVD players, televisions, and the content they are used to access.¹² These centers are an important content resources for library patrons. Thus, students and teachers use media

analyze, evaluate, package, and disseminate information to facilitate accurate decision-making in corporate, academic, and government settings.

⁷ See American Library Association, *How Many Libraries Are There In The United States?*, Library Fact Sheet Number One at <http://www.ala.org/library/fact1.html> (stating that there are an estimated 117,418 libraries of all kinds in the United States today).

⁸ See Chute et al., *Public Libraries in the United States; Fiscal year 1999* (NCES 2002-308), National Center for Education Statistics (reporting that in the year 2000, visits to public libraries alone totaled 1,146,284,000, or 4.3 per capita).

⁹ See id. (stating that public libraries alone house more than 32 million audio materials and 22 million video materials).

¹⁰ Examples of periodicals only available in an electronic format include Techlaw, the Electronic Journal of Sociology and the Electronic Journal of Linear Algebra.

¹¹ See Chute et al., *supra* note 8 (reporting that in 1999, 92 percent of public libraries had access to the Internet).

¹² See Bradford Chaney, National Center for Education Statistics, *School Library Media Centers: 1993-94* (NCES 98-282) (noting that in 1993-4, 96 percent of public schools and 80 percent of all private schools had library media centers, compared with 50 percent of the public schools in 1950 and 44 percent of private schools in 1962).

centers to create multimedia projects to instruct or to perform assignments.¹³ For example, a teacher may use excerpts from news coverage of the 2000 Bush/Gore election for a social studies lesson, or a student may use a recorded segment from “The Lost Elephants of Timbuktu” episode of *Wild Kingdom* in her presentation for a conservation project in her environmental science class.

New media technologies offer vast opportunities for libraries and other educational organizations to make content available to users. For example, medical students can use digital video technology to observe operations or participate in clinical rotations from remote locations.¹⁴ Through the University of Hawai’i Hilo, students on remote islands are using distance education techniques such as videoconferencing to obtain degrees in Hawaiian studies and computer science.¹⁵ Students across the continental U.S. may also take elementary Hawaiian language classes at the University of Hawai’i over the Internet, thereby allowing Hawaiians who have left the islands to maintain a crucial link to their native culture.¹⁶ School, public and academic libraries often supply the content needed by these educational initiatives.

Additionally, libraries act as valuable resources to underserved populations including immigrants,¹⁷ the homeless,¹⁸ the poor, and others through services offered at

¹³ See American Library Association, *Partner in Learning: The School Library Media Center*, available at www.ala.org/pio/factsheets/schoolmedia.html (observing that students visit school library media centers almost 1.5 billion times during the school year). Specifically, 47 million elementary, middle, and high school students use a library media center each week. Id. The study also notes that the highest achieving students come from schools with strong school libraries. Id.

¹⁴ See Philip O. Ozuah, *Undergraduate Medical Education: Thoughts On Future Challenges*, BMC MEDICAL EDUCATION, July 30, 2002, available at www.biomedcentral.com/1472-6920/2/8.

¹⁵ See Press Release, University of Hawaii at Hilo, UH-Hilo to Award First Four Distance Learning Degrees released May 13, 2002 available at www.uhh.hawaii.edu/news/2002/02-5-13a.html.

¹⁶ See Michele Delio, *Aloha, You’ve Got Hawaiian 101*, WIRED, Sept. 6, 2002 available at www.wired.com/news/culture/0,1284,54938,00.html (noting that for the first time an indigenous language will be taught solely over the Internet).

¹⁷ See National Center for Education Statistics, *Services and Resources for Children and Young Adults in Public Libraries* (Aug. 1995)(finding that 64 percent of public libraries currently have young adult

the library, and through various forms of outreach. In the past, America's libraries reached out by establishing branches in urban neighborhoods or rural communities. Even then, however, some potential patrons were not able to avail themselves of library resources. So libraries took further steps, including the familiar bookmobiles that provide services to patrons who may not be able otherwise to get to a library. Today, an ever-growing number of children and adults—rich and poor, urban and rural—have access to the Internet at home, school, work, or some other location. As a result, libraries can now bring an even wider range of information resources to underserved patrons via these networks. As Congressman W.J. Billy Tauzin framed the question during the congressional hearings on the Digital Millennium Copyright Act¹⁹:

I grew up in a bookmobile.... Every Tuesday the bookmobile came to Chatville, Louisiana and my mother and I would go into that bookmobile and we would borrow every single book they would allow us to borrow... It was literally my entry into the world of education in a real sense, living on a bayou in Louisiana.... [Now] I want to deal with the real hypothetical where the library in Thibodaux, under the new digital world [owns] a book digitally. And I want to borrow it in Chackbay, and I want to contact my library, borrow that book and read it. Can I do that in this world without someone requiring me to pay for that right?

Hearing on the WIPO Copyright Treaties Implementation on H.R. 2281 Before the House Energy and Commerce Committee, Subcommittee on Telecommunications, Trade and Consumer Protection, 105th Cong. (1998).

materials in languages other than English). The Queens Borough Public Library has developed extensive programs that cater specifically to the area's immigrant population, using print media, electronic resources and the Internet to not only provide access to materials in peoples' native languages but also to assist them with their English as a Second Language programs. See Queens Borough Library, *New Americans Program Services* at www.queenslibrary.org/programs/nap/nap_services.asp.

¹⁸ See American Library Association, *America's Libraries and the Homeless*, at www.ala.org/pio/factsheets/homeless.html (explaining that the San Francisco Public Library and the Free Library of Philadelphia provide library cards to the homeless as well as those with permanent addresses). Libraries also provide extensive programming for children, including story hours and films, at city shelters for the homeless. Id.

¹⁹ See Digital Millennium Copyright Act, Pub. L. No. 105-304, 1122 Stat. 2860 (effective Oct. 28. 1998).

If this mission of America's libraries is to be fulfilled, the answer to the Congressman's question must be "yes." Premature or ill-considered implementation of the broadcast flag should not impede the realization of the new potential for outreach by libraries that digital technology promises.

B. The Libraries Are Advocates Of The Public's Interest In The Legal And Technical Environment

The Libraries advocate for policies and laws that support broad access to information. This reflects their members' strong commitment to principles of free speech, the public's right to receive information, the advancement of education and scholarly research, lifelong learning, and preservation of our nation's cultural heritage. As the Commission is aware, the Libraries participated in the E-Rate rulemaking and increased community access to low power FM radio rulemaking.²⁰ The Libraries have also been advocates for the public interest in access to information and in the debate regarding digital rights management (hereinafter DRM). This rulemaking is of great importance to the Libraries because depending upon its outcome, there may be restrictions on libraries' ability to carry out their missions.

The broadcast flag would grant private copyright owners what are effectively additional intellectual property rights in their content by restricting the rights of users to lawfully use and excerpt that content. This proposed grant of additional rights is justified in the NPRM's introduction by the assumption that high quality digital content providers

²⁰ See American Library Association, Comments Regarding FCC Notice of Proposed Rule Making-MM Docket No. 99-25) (arguing in favor of the creation of low power radio services). The Libraries have also submitted numerous written comments to the Commission regarding the E-Rate program, which are available in their entirety at www.ala.org/oitp/telcom/hearingsus.html.

will not provide content for digital television unless the Commission makes a rule mandating broadcast flag copy protection. Leaving aside the question of whether this is a valid assumption, it is in itself an insufficient justification, as it ignores the losses in public information access that such a concession of additional intellectual property rights to private parties would entail. The Commission must consider whether such a rule is truly in the public interest especially, where as here, such determinations have traditionally been within the purview of Congress.

C. The Broadcast Flag and Digital Rights Management

The Libraries are concerned about proposed technological restrictions that would limit the ability of libraries and their patrons to use digital broadcast content for teaching, study, and scholarship. Such restrictions, if not subject to appropriate exceptions or a legal means to bypass them for legitimate purposes, would limit or eliminate some of the services that libraries provide to the public.

1. What is the broadcast flag?

Literally understood, the term broadcast flag refers to a signal that may be imbedded in digital broadcast content. The signal is designed to interact with equipment that is engineered to recognize it. Where it is present, the signal serves to regulate performance of such equipment. As the term is generally used, and as we use it here, broadcast flag refers to both the signal itself and the larger system of technology that grants content providers the ability to impose restrictions on the public's legal use of content.²¹

²¹ See Drew Clark and Bara Vida, *Digital Divide*, NATIONAL JOURNAL'S TECHNOLOGY DAILY, Sept. 6, 2002 (discussing the technological components of the broadcast flag). The explanation of the broadcast flag

The broadcast flag could be implemented in many different ways. It could be used to control: what digital broadcast content can be recorded by recipients; when, where, and how recorded content may be viewed; and whether such content can be manipulated by a recipient, transferred to other storage media, or shared beyond the location where it was originally received. Other even more intrusive applications of broadcast flag may be possible, such as monitoring locations where content is received, recorded, and used. The Libraries are concerned that a Commission rule mandating any or all of these broadcast flag applications will have an adverse impact upon their ability to provide content to their patrons, and their patrons' ability to make lawful use of it.

2. The Benefits Of The Broadcast Flag Have Not Been Demonstrated

The NPRM suggests that the broadcast flag rule is needed to encourage content provision for the rollout of digital television.²² Specifically, content owners have indicated that they will withhold content from, or refuse to develop content for, digital television unless they are given additional legal and technological protection against what they consider to be the potential for the unlawful use and distribution of their materials.²³ This argument has been made before, and seems to surface with each new technological advance in consumer information technology.

During the policy discussions surrounding the introduction of consumer video recording technology, content owners asserted that the new technology would be

in the preceding text represents our effort to explain in lay language a concept that is often discussed in highly technical terms. *See generally* Final Report of the Co-Chairs of the Broadcast Protection Discussion Subgroup to the Copy Protection Technical Working Group (June 3, 2002).

²² *See* FCC Notice of Proposed Rulemaking, *In the Matter of Digital Broadcast Copy Protection*, MB Docket No.02-230 (citing to Letter from Susan L. Fox, Walt Disney Company, to Magalie Roman Salas, Secretary, FCC, CS Docket No. 97-80 (Nov. 8, 2001).

²³ *Id.*

disastrous to the industry's profitability.²⁴ Specifically, content owners claimed that if the public was allowed to record broadcast programs on their home recording equipment to watch later, there would be a diminished market for motion picture content on broadcast television.²⁵ The movie industry argued that if it were denied profits from this market, the result would be a reduction in new motion picture production.²⁶ Arguing that home taping constituted copyright infringement, they sought to bar consumer use of the new technology.²⁷ However, as the rollout of the VCR continued, it became apparent not only that the doomsday fears of content providers were misplaced, but that the opposite was true: the advent of personal video recorders created an entirely new market for content owners.²⁸ This result occurred because the Supreme Court saved this industry from itself and held in *Sony v. Universal Studios* that the sale of the personal video recorder did not constitute a copyright violation.²⁹ The Court determined that consumer use of the technology posed no substantive threat to content owners' copyrights because the most likely uses, such as time-shifting,³⁰ were protected under the fair use exemption of copyright law.³¹

Just as the hyperbole of the movie industry proved baseless in the personal video recording debate, the content owners' claims that broadcast flag is a real precondition for

²⁴ See JAMES A. LARDNER, FAST FORWARD 97-104 (rev. ed. 2002)(discussing the fears of movie studios that the development of the VCR would allow individuals to consume content without paying a premium or archive it for repeated use).

²⁵ See id. at 98-99 (explaining how personal recording devices would hinder the profits from a movie's sale to television networks for broadcast). The movie industry believed that the VCR would prevent it from being able to exploit every potential market, assuming that once people had VCRs they would tape everything from television and thus content would only be able to be shown once for profit. Id.

²⁶ Id.

²⁷ See id. at 92-95 (discussing the motivations of both parties in the *Sony v. Universal* litigation).

²⁸ See id. at 173-188 (tracing the development of the home video rental market).

²⁹ 464 U.S. 417, 500 (1984).

³⁰ See id. at 423 (explaining that both parties in the case presented surveys which concluded that most people used their VCR to record programs that they missed to watch at a different time than they were originally broadcast).

the availability of digital broadcast content is not supported by any empirical evidence. Thus, it is unclear that a broadcast flag rule is justified or that it would provide any benefit to the general public.

3. The Broadcast Flag Represents A Shift In the Direction of DRM Policy

In 1998, Congress passed the Digital Millennium Copyright Act,³² which included sanctions against those who circumvent technological measures applied to copyrighted works. Congress did not then mandate, nor has it since, specific technological controls or their incorporation into digital electronic equipment.³³ Nevertheless, the Commission is considering whether to promulgate a broadcast flag rule that will create a government mandate that specific technology be incorporated in a range consumer electronics equipment. Such a mandate could diminish significantly the usefulness of new digital technologies for libraries and the public at large.

A Commission rule on the broadcast flag would determine not only whether this digital rights management technology will be mandated, but also how it would be deployed. The technology in its most basic form functions as an “on/off” switch, regulating the functioning of consumer electronics equipment. As we have noted, the broadcast flag could block certain uses of digital television content. The switch also could be adjusted to discriminate between specific types and forms of content, limiting

³¹ Id. at 500.

³² Pub. L. No. 105-304, 112 Stat. 2860 (1998).

³³ Sec. 1201(k)(1) of the DMCA contains only one, narrowly limited technology mandate, directing that new analog videocassette recorders must conform to the “automatic gain control technology” — i.e. the “Macrovision” copy control system. The Conference Report on the DMCA states that “this provision is being included in this bill in order to deal with a very specific situation involving the protection of analog television programming and prerecorded movies....” H.R. Rept. 105-791, 105th Cong., 2d. Sess. 68 (1998). This provision has no application to digital content or digital technology. The only other congressional venture into this domain was the 1992 Audio Home Recording Act, 17 U.S.C. Secs. 1001-1010, legislation which was possible only because it represented a carefully negotiated compromise between representatives of affected industries. See generally Lewis Kurplantzick & Jacqueline Pennino, *The Audio Home*

libraries' and their patrons' uses with respect to some programs while permitting them with respect to others.³⁴ The flexibility of the technology may allow for exceptions that approximate the traditional balance inscribed in copyright law. However, that same flexibility also means the broadcast flag is ripe for abuse, allowing content owners to predetermine and control consumer use in disregard of basic copyright principles. Therefore, any rule implemented by the Commission must be carefully crafted to protect legal use of content by the public.

II. THE FUNDAMENTAL LIMITATIONS AND EXCEPTIONS IN COPYRIGHT LAW ALLOW LIBRARIES TO PROVIDE PUBLIC ACCESS TO INFORMATION

The broadcast flag's implementation threatens the well-established limitations and exceptions in copyright law that balance the exclusive rights of content owners with the rights of the public to access and use that content. Copyright law, which is founded in the Constitution,³⁵ represents a balancing of incentives to create and to provide public access to ideas and content.³⁶ The Constitution empowers Congress to enact copyright legislation for the specific purpose of promoting scientific progress and the arts by granting exclusive rights in works to the authors and artists for a limited duration.

Recording Act of 1992 and the Formation of Copyright Policy, 45 J. COPR. SOC'Y 497 (1998). That compromise has not been revised by subsequent legislation.

³⁴ See Adrien Bettelheim, *Hill Contemplates Copyrights: Does Innovation Trump Piracy?*, CONGRESSIONAL QUARTERLY WEEKLY, April 6, 2002, at 899-900 (explaining the function of the broadcast flag).

³⁵ See U.S. CONST. art. I, § 8, cl. 8 ("Congress shall have power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

³⁶ See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (holding that "[c]reative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts").

Pursuant to this public purpose, the Copyright Act³⁷ grants rights holders the exclusive right to make copies of their works³⁸ and distribute them,³⁹ while at the same time, these exclusive rights are narrowed by limitations and exceptions in copyright law, designed to foster innovation and promote non-profit personal and educational use. Libraries and their patrons benefit from these generally applicable limitations and exceptions. In addition, Congress has seen fit to create specific copyright exemptions for libraries that further enable them to provide patrons with information access.

A. Fair Use

The doctrine of fair use allows culturally valuable new uses of portions of copyrighted works to be made without permission.⁴⁰ In determining whether a particular use falls within the fair use doctrine, the court looks at four factors.⁴¹ First is the “purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purpose.” Second is “the nature of the copyrighted work.” Third is “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.” Fourth, there is “the effect of the use upon the potential market for or value of the copyrighted right.” The public relies on the fair use exemption to use content from works in library collections. Thus students are allowed to photocopy pages from a book and quote passages, or to excerpt a video clip from a recorded educational

³⁷ 17 U.S.C. §§ 101-803

³⁸ 17 U.S.C. §106(1)

³⁹ 17 U.S.C. §106(3)

⁴⁰ See generally *Sony v. Universal*, 464 U.S. 417. See also 17 U.S.C. §107 (providing the fair use exemptions in copyright law).

⁴¹ 17 U.S.C. §107

broadcast. These are lawful activities that government regulation should foster, rather than discourage.

Fair use is a flexible doctrine, affirmed by Congress in the 1976 Copyright Act,⁴² designed to evolve with changes in technology and consumer information practices. Implementation of the broadcast flag risks rolling back or even eliminating the doctrine as applied to digital media. In *Sony v. Universal*, the Supreme Court recognized that new technologies can enable fair use.⁴³ Unless they are created for the unambiguous purpose of copyright infringement, the public interest dictates that such new technologies should not be suppressed.⁴⁴ Many technologies now exist, or soon will exist, that will allow the active, productive use of content received by means of digital television transmission. There is simply no legal or factual justification to restrict the lawful use of such content.

Imagine a family living in a rural area of the Midwest and the benefits they enjoy under traditional copyright exceptions, including fair use. Under current copyright law, the following educational and non-profit practices are allowed. The mother, who volunteers in an “English as a second language” course offered by a public library, uses video clips from a Spanish television show to illustrate lessons. The twelve-year-old son uses his school library to find media coverage from the 2000 presidential debate for a presentation in his civics class. The sixteen-year-old daughter sends highlights of her recent performance in a high school softball game, covered by the local television station, over the Internet to her grandfather. Under the broadcast flag, all these otherwise lawful and beneficial practices would be at risk.

⁴² Id.

⁴³ 464 U.S. 417.

B. Availability Of Facts And Works In The Public Domain

Copyright law does not protect facts, or ideas, or material that is in the public domain.⁴⁵ This kind of content does not belong to copyright owners; rather, it is the common property of the public at large—whether it is a list of map references, a mathematical equation, the text of an Elizabethan drama, or a scene from a classic silent motion picture. Often, however, such information is found embedded in works that do enjoy some degree of copyright protection in their other contents, such as literary anthologies or educational television programs. In other words, many copyrighted works – whether printed texts or broadcasts—contain significant amounts of unprotected content with considerable educational or cultural value. Under traditional copyright law, readers and viewers are permitted not only to read or view this unprotected material, but to capture it for reuse. In order to do so, however, they must be able to access and manipulate the protected work in which it is contained so as to extract the unprotected portions. Again, traditional copyright law has always allowed for such practices.⁴⁶ By contrast, DRM systems in general, and potentially the broadcast flag in particular, work by locking up entire works and making it difficult or impossible for users to access their content. In this way, these technological locks create an effective absolute monopoly over information where traditional copyright provides only a conditional one.

⁴⁴ See *id.* at 431-32 (stating the that ultimate goal of copyright law is the public benefit “derived from the labors of authors,” thus “when technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose”).

⁴⁵ The public domain includes works made freely available to the public, including most works made by the government, and those works whose term of copyright protection has expired.

⁴⁶ *Feist Publications v. Rural Telephone Services Company*, 499 U.S. 340 (1991) (stating that while the organization of facts may be copyrighted, the underlying facts may not.)

If libraries and their patrons cannot access, copy, or manipulate digital television programs, their ability to extract and use unprotected material may be severely limited, as a practical matter. Users will be restricted to second-best alternatives, such as attempting to recreate the content, after the fact of viewing it, a process that is at best inefficient and at worst inaccurate. This presents a large potential burden on legal, productive information practices.

C. Preservation and Archiving.

Traditional copyright law recognizes the importance of libraries' role in education and the promotion of progress. It is critical that any broadcast flag rule should do likewise, and provide appropriate exceptions to enable and not stifle library activities. In traditional copyright law, some of libraries' important institutional practices, such as the long-term preservation of the cultural record, receive explicit recognition in sections of the Copyright Act that provide a specific library exemption, such as 17 U.S.C. §108.⁴⁷

A case in point is the archiving of broadcast material. Today, libraries throughout the United States may record and store television programming for a limited period of time.⁴⁸ For example, the Television News Archive at Vanderbilt University, a unit of the Jean & Alexander Heard library, has long operated by virtue of a specific statutory exemption that allows the archiving and limited circulation of copies of news broadcasts.⁴⁹ This archive contains more than 30,000 individual network evening news

⁴⁷ 17 U.S.C. §108 provides the exemptions in copyright law that libraries rely upon to fulfill their archiving and preservation functions.

⁴⁸ See American Library Association, *30 Questions Librarians Ask about Taping Copyrighted Television Programs for Educational Use* 11 (1982) (explaining the guidelines for copies made for specific purposes).

⁴⁹ See generally *About the Archive* at www.tvnews.vanderbilt.edu/about.html. The "Vanderbilt Clause" is found at 17 U.S.C. §108(f)(4).

broadcasts and more than 9,000 hours of special news-related programming. It allows researchers and students to conduct comparative media studies such as coverage of the Persian Gulf War versus the war in Rwanda. The archive is also used to research changes in public opinion, dress, and social trends, and by the broadcasters themselves to do research for news stories. But the holdings of these archives can be fully useful for study purposes only if they are also available away from the physical site where they were recorded. Vanderbilt, for example, will create tapes of requested news broadcasts for the use of scholars who live far from Nashville. Today, copyright law allows such content sharing. Under the broadcast flag, by contrast, the availability of lawfully archived digital broadcasts would be dramatically limited.

D. Distance Education

A broadcast flag rule may also prevent libraries from performing their educational roles, such as through digital distance learning. The Technology, Education And Copyright Harmonization Act (TEACH) Act, which became law on November 2, 2002,⁵⁰ is intended by Congress to enhance learning capabilities through technology and media. According to Senator Orrin Hatch, this Act is part of a “comprehensive education reform that . . . deploy[s] the latest digital technologies to give our students the very best educational experience we can offer.”⁵¹ The Act also “allow[s] students and teachers to

⁵⁰ Technology, Education And Copyright Harmonization Act, Pub. L. No. 107-273 (Nov. 2, 2002). See generally Kenneth D. Crews, *New Copyright for Distance Education: The Meaning and Importance of the TEACH Act*, available at www.ala.org/washoff/teachsummary.pdf. See also Laura Gasaway, *Balancing Copyright Concerns: The TEACH Act of 2001*, *EDUCAUSE REVIEW*, Nov.-Dec. 2001.

⁵¹ Press Release, U.S. Senate Judiciary Committee, Statement of Orrin G. Hatch on the Markup of S. 487, the Technology, Education and Copyright Harmonization Act (May 17, 2001). Senator Hatch also noted that “the benefits of online or distance education extends beyond the traditional student making expanded opportunities available for working parents, senior citizens, and anyone else with a desire to learn.” *Id.*

benefit from deployment of advanced digital technologies like the Internet and bring media-rich learning experiences wherever students are located.”⁵² The law enhances the learning process by expanding exemptions under copyright law to permit Internet use of audiovisual and sound recordings, among other things. A broadcast flag, however, would hinder precisely what the TEACH Act is designed to promote. For example, an educator who wishes to use excerpts from a television news program to illustrate a lesson in the electronic classroom might not be able to record the program, nor to incorporate the material into a lesson designed for students in a class whose access is through the Internet. As Senator Hatch’s comments demonstrate, an important theme in contemporary educational reform is the need to share the full benefit, rather than restrict the use, of digital technology. A broadcast flag rule would prevent the realization of this goal.

III. THE COMMISSION IS WITHOUT JURISDICTION TO PROMULGATE A BROADCAST FLAG RULE

The Libraries believe that the Commission lacks the jurisdiction to promulgate a rule for the broadcast flag that will in effect limit the distribution of content and could disrupt the balance between rights holders and the public.

A. The Commission Lacks Statutory Authority To Promulgate The Rule

In proposing to adopt a rule on the broadcast flag, the Commission is going beyond the realm of technical standards for digital television that it has explicit statutory authority to regulate, and entering the realm of intellectual property. As shown earlier in

⁵² Id.

these comments and as the Commission acknowledges in the NPRM,⁵³ the broadcast flag rule addresses content. Indeed, the origin of the rule is to encourage the development of content for digital television.⁵⁴ As such, a broadcast flag rule would be in tension with copyright legislation that defines the rights of content owners and content users.

The Libraries believe the Commission lacks the authority to regulate the rights of content users to use copyrighted material in the absence of unambiguous statutory authority. That authority does not exist. Moreover, there is nothing in the text of the Telecommunications Act of 1996 that would even arguably confer authority on the Commission to promulgate this rule. The Commission admits that its authority to regulate in this area is ambiguous at best because it specifically requested comment on its authority to do so.⁵⁵

In particular, the Commission relies upon 47 U.S.C. §336(b)(4) and §336(b)(5) as possible sources of authority for the rule. Neither provision provides that authority.

Section 336(b)(4) grants the Commission authority to promulgate rules to assure signal quality for advanced television services.⁵⁶ There is not, nor could there be, a claim that the broadcast flag would enhance the signal quality of digital television. Therefore, this Section does not authorize the Commission to promulgate a rule.

The Commission's jurisdiction fares no better under Section 336(b)(5). This section of the statute addresses the preservation of effective broadcast television for advanced television services that is consistent with protecting the public interest. Again,

⁵³ See FCC Notice of Proposed Rulemaking, *In the Matter of Digital Broadcast Copy Protection*, MB Docket No.02-230.

⁵⁴ *Id.*

⁵⁵ See FCC Notice of Proposed Rulemaking, *In the Matter of Digital Broadcast Copy Protection*, MB Docket No.02-230.

there is nothing on the face of this provision that would authorize a rule that regulates the content of the broadcast. Indeed, we are unable to find anything in the legislative history of the Act that suggests that the Commission would have such authority. Both the House Report and Conference Committee reports on Public Law 104-104 are completely silent on the purpose of Section 336(b)(5).⁵⁷ On the other hand, the reports go into some detail on the purposes of sections 336(b)(1)-(4), which deal with spectrum regulation, signal quality, and the duties of licensees. Thus, when this provision is read in the context of the statutory purpose, there is simply no basis to conclude that Section 336(b)(5) gives the Commission statutory authority to regulate in the area of content.

The Commission's authority to regulate in the area of content is further placed in doubt by the recent decision in *MPAA v. FCC*.⁵⁸ There, the DC Circuit Court of Appeals held that absent an explicit delegation of authority from Congress, the Commission does not have the jurisdiction to regulate program content.⁵⁹ Furthermore, the court found that even if the FCC's efforts can be considered to be in the public interest, the Commission does not have jurisdiction unless specifically provided for by statute.⁶⁰ The Commission lacks the authority to promulgate a rule, such as the broadcast flag, which would burden the lawful access to and use of content.

B. The Commission Should Decline To Make Intellectual Property Law In The Form Of A Broadcast Flag Rule.

⁵⁶ See 47 U.S.C. §336(b)(4) (providing that "the Commission shall adopt such technical and other requirements as may be necessary or appropriate to assure the quality of the signal used to provide advance television services").

⁵⁷ See H.R. REP. NO. 104-204 at 1117 (1995). See also H.R. CONF. REP. NO. 104-458 at 160 (1996).

⁵⁸ See *MPAA v. FCC*, 2002 U.S. App. LEXIS 23225 (D.C. Cir. 2002).

⁵⁹ See *id.* at *13 (stating that neither 47 U.S.C. §713 or Title 1 of the Communications Act of 1934 grants the FCC authority to promulgate a rule on programming content).

In general, the legal regulation of DRM technology implicates a wide range of politically and constitutionally sensitive issues, including the economics of the information industries, cultural policy, privacy and freedom of expression. It is also a topic on which various interested groups in society hold strongly opposed positions—some favoring greater access to information and others advocating more restrictions on information use. The point of convergence where such disparate issues are harmonized and such divergent interests are balanced always has been the federal law of intellectual property, enacted pursuant to the U.S. Constitution, Art. I, Sec. 8. cl. 8. From the mid-1990's on, Congress has treated DRM questions as a highly controversial aspect of intellectual property policy, uniquely well suited to resolution by the political process. The long history of legislative activity that gave rise to 17 U.S.C. §1201, the anti-circumvention provisions of the DMCA, exemplifies this deliberate approach.⁶¹ With one minor exception, Congress has not chosen to delegate any of its legislative authority in this area,⁶² let alone to the Commission. Instead, the congressional debate continues.⁶³

⁶⁰ Id. at *29.

⁶¹ For lively reviews of the legislative history, see generally David Nimmer, *Puzzles of the Digital Millennium Copyright Act*, 46 J. COPR. SOC'Y 401 (1999); *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673 (2000); *Appreciating Legislative History the Sweet and Sour Spots of the DMCA's Commentary*, 23 CARDOZO L. REV. 909 (2002).

⁶² 17 U.S.C. 1201(a)(1)(C) confers on the Librarian of Congress, acting upon the recommendation of the Register of Copyrights, the delegated authority to make certain narrowly circumscribed exceptions to the anti-circumvention provisions of §1201(a)(1)(A), though not those of §1201(a)(2) or (b)(1). See JeanAne Marie Jiles, *Copyright Protection in the New Millennium: Amending the Digital Millennium Copyright Act to Prevent Constitutional Challenges*, 52 ADMIN. L. REV. 443 (2000) (questioning the legality of the delegation). For the results of the first rulemaking under this provision, see "Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies; Final Rule," 65 Fed. Reg. 64556, Oct. 27, 2000. DMCA Sec. 1201(a)(1) rulemaking procedure.

⁶³ On October 3, 2002, for example, Representatives Rick Boucher and John Doolittle introduced H.R. 5544, a bill which would significantly revamp the anti-circumvention provisions of the DMCA. As Rep. Boucher explained: "Efforts to exercise [fair use] rights are being threatened by the application of section 1201 of the DMCA. Because the law does not limit its application to circumvention for the purpose of infringing a copyright, all kinds of traditionally accepted activities may be at risk." CONG. REC. E1769, (daily ed. Oct. 4, 2002). See generally Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, 14 BERKELEY TECH. L.J. 519 (1999)(discussing examples of the critiques of the DMCA that helped to give rise to this legislation). See

As we have noted above, the broadcast flag proposal represents a radical and unprecedented expansion of this new form of intellectual property regulation. If adopted, it would be the first general mandate of a DRM technology. In such a rule, the Commission would be choosing to go where Congress itself has so far feared to tread; indeed, the very concept of DRM mandates has proven highly controversial in Congress and in the larger community.⁶⁴ We also would note that any broadcast flag rule issued by the Commission would have precedential significance by serving as a model for other mandate proposals. These could include regulation of the design of general-purpose computers to limit consumer uses of content transmitted over digital networks or available on prerecorded media. Congress ultimately may or may not choose to legislate on the general topic of DRM mandates—or to specifically delegate its authority to do so. Until that time, the Commission should stay its hand on the issue of the broadcast flag.

IV. IN THE ALTERNATIVE, IF THE COMMISSION DECIDES IT HAS THE JURISDICTION TO PROCEED, THE RULE MUST INCORPORATE ESTABLISHED COPYRIGHT EXEMPTIONS RELIED ON BY LIBRARIES AND THEIR PATRONS

As has been demonstrated, the broadcast flag has the strong potential to limit the ability of libraries, schools, and academic institutions to serve the information needs of their communities. In order to preserve these vital services, any broadcast flag rule the Commission may adopt must protect all rights: those of creators and content providers, those of consumers

also Electronic Frontier Foundation, *Unintended Consequences: Three Years Under the DMCA*, May 3, 2002, available at http://www.eff.org/IP/DMCA/20020503_dmca_consequences.pdf.

⁶⁴ See Clark & Vida, *supra* note 21 (discussing the extreme polarization of views on S. 2048, the Consumer Broadband and Digital Television Promotion Act (CBDTPA), proposed legislation originally introduced by Senator Fritz Hollings as the Security Systems Standards and Certification Act (SSSCA); See also Mike Godwin, *Free to Tinker: IP caution could undermine the great American urge to innovate*, AMERICAN LAWYER, Oct. 21, 2002, at 50.

and the general public, and those of libraries, schools, and academic institutions. Copyright law today balances those rights successfully, and public policy must not enforce, protect, or encourage any DRM system that does not meet the fundamental criterion of harmonizing such competing interests. To avoid undermining well-established and constitutionally based balances instituted in copyright law, any rule must incorporate exemptions for the full range of lawful practices that copyright law now authorizes.